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| **In:** | **KSC-BC-2020-07** |
| | **The Prosecutor v. Hysni Gucati and Nasim Haradinaj** |
| **Before:** | **Court of Appeals Panel** |
| | Judge Michèle Picard |
| | Judge Emilio Gatti |
| | Judge Nina Jørgensen |
| **Registrar:** | Dr Fidelma Donlon |
| **Filing Participant:** | Specialist Counsel for Nasim Haradinaj |
| **Date:** | 13 August 2021 |
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# Publicly Redacted Version of Reply to the Prosecution Response to the Defence Appeals of Disclosure Decision

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**Specialist Prosecutor**

Jack Smith

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

## I. INTRODUCTION

1. Specialist Counsel for Mr. Haradinaj seeks to reply to the Response[1] of the Specialist Prosecutor's Office of 8 July 2021 to the Defence Appeals.[2]

2. At the outset, Specialist Counsel for Mr. Haradinaj notes with strong regret and opposition the particularly hostile and condescending tone of the SPO's Response, which regrettably is not the first of its kind against Specialist Counsel.[3] This has become a regrettable common theme of litigation before the Specialist Chambers which has, over time, deteriorated to the extent that all submissions, public or otherwise, involve allegations of misconduct or impropriety. The SPO needs to recognise that proceedings before the Specialist Chambers are adversarial in nature.

3. Specialist Counsel understands, and to an extent, understands, that the SPO is frustrated with the Defence's efforts to put forward the case according to client instructions, including making reasonable enquiries that may be uncomfortable for the SPO, but are part of matters necessary to the Defence case. It is submitted that such enquiries should nevertheless be responded to

[1] KSC-BC-2020-07/IA005/F00005.
[2] Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00210 pursuant to Article 45(2) and Rule 170(2), KSC-BC-2020-07/IA005/F00002, 25 June 2021, Confidential ('Gucati Appeal'); Submissions on Appeal of Decision KSC-BC-2020-07/F00210, KSC-BC-2020- 07/IA005/F00003, 25 June 2021, Confidential ('Haradinaj Appeal', together with the Gucati Appeal: the 'Defence Appeals').
[3] Words by the SPO directed at the Defence, including directly at the Haradinaj Defence include: "deficiencies" (para. 16), "absurdity" (para. 20), "frivolous", "baseless" (para. 34), "fanciful challenges" (para. 35), "the only limit would be the Defence's imagination" (para. 35).

seriously, respectfully and professionally. To do so otherwise, risks bringing the institution unto disrepute.

4. As argued in the Defence Appeals, it is maintained that the material sought to be disclosed is both relevant and material to the preparation of the Defence.

5. The Defence for Mr. Haradinaj will limit the following submissions to replies to points raised in the SPO Response.

## II. BACKGROUND

6. The relevant background is set out in the Defence Appeals and is not repeated here.

## III. LAW

7. The relevant law is set out in the Defence Appeals and is not repeated here.

## IV. SUBMISSIONS

### A. The relevance of the materials for the entrapment defence

8. At paragraph 19, the SPO claims it does not have any evidence of entrapment.[4]

9. In the first instance, it is not for the SPO to make this determination as to accede to this point in effect allows an institution to investigate itself. We would therefore reiterate submissions made previously, in that it is not for the SPO to determine what is appropriate to disclose and what is not.

10. Further, and with respect, the statement of the SPO is backed with neither proof nor with any efforts to disprove. Nor do absolute statements of this kind enjoy much credibility anymore among Defence Counsel: Time and time again, the SPO in this case assured the Defence and the Pre-Trial Judge, including on public record at status conference after status conference, that it had complied with its disclosure obligations fully, only to then release tens of thousands of pages of further disclosures to the Defence.

11. In any analogous case, where thousands of pages of "sensitive" or "confidential" material were leaked, any professional investigative body would do what it does best: investigate, and in doing so conduct, at the very least, an internal investigation into those leaks and into who is responsible, in order to prevent it from happening again in the future. It is unclear whether such an investigation has been conducted but it would frankly be shocking if not, therefore, the presumption is that there was some kind of an internal

[4] Response, at para. 19.

investigation into the leaks. In that case, surely, any extremely sensitive details of the investigation could for example be disclosed with appropriate redactions, rather than a blanket denial on the grounds of relevance.

12. Next, at paragraph 20 of its Response, the SPO completely misrepresents the Haradinaj Defence submissions and then labels them "absurd." Such language is unhelpful, and yet is indicative of the contempt with which the Defence is often treated. Further, the Haradinaj Defence submissions in the cited paragraphs do not state that the SPO "*had a perceived lack of interest in preventing or thwarting the 'leaks'*." Nothing is said about the mindset of any individuals or a perceived "lack of interest." Rather, a logical Defence narrative is put forward which purports to show to the Court of Appeals Panel that it is simply stunning and inexplicable, that nothing was done to investigate the drop-offs of the batches of documents at the KLA WVA.

13. At paragraph 21, and again at paragraph 23, the SPO argues that it is not factually possible to make the argument of incitement or entrapment. With respect, that is not a factual assessment or decision for the SPO but for the Court to make.

14. At paragraph 21 of its Response, the SPO argues that statements of the Accused allegedly make it clear they do not know the persons who dropped off the documents, nor did they interact with them, this does not render the

defence of entrapment void; notably, the SPO fails to further elucidate its assessment of the relevant test for demonstrating entrapment, and therefore, is submissions on this point ought to be dismissed.

15. At paragraph 24 and following, the SPO relies heavily on the European Court of Human Rights ("ECtHR") case of *M v. Netherlands*[5] to support its notion that an internal investigative report would not have to be disclosed. In seeking to suggest that the instant case is analogous with *M v. Netherlands*, the SPO has gone out on a limb.

a. *Firstly*, the SPO fails to explain the central difference between *M v. Netherlands* and the present. Indeed, as the SPO cites, the purported internal report of the secret service internal investigation was found to not have been in the hands of prosecution or the court in nor was it possible for those two entities to establish it actually existed. In this case, however, the only entity in question is the SPO and it has custody over its own investigative reports. Of course, a Dutch prosecutor or judge may not be able to ascertain the existence of an internal investigative report conducted in the Dutch secret service, simply because they are separate entities entirely and also, because of the nature and laws of the workings of a secret service. This is simply not the case here, therefore

[5] ECtHR, *M v. The Netherlands*, 2156/10, Judgment, 25 July 2017.

the SPO cannot rely on M v. Netherlands to deny disclosure of an internal investigative report.

b. *Secondly*, an important difference is that relevant secret or confidential documents at stake in *M v. Netherlands* were actually made available to the defendant for the preparation of his defence, rather than no documents being made available at all, as in the present case. One must observe that in M v. Netherlands, the documents concerned were classified documents from a secret service which included state secrets. Those documents were disclosed with appropriate redactions for the purposes of the criminal proceedings. There is no reason why redactions cannot be applied in the present case. In proceedings before the KSC, the SPO simply cannot claim higher secrecy of its own documents than that of a secret service.

16. The Appeals Panel is invited to consider the significant differences between the present case and *M v. Netherlands* and rule on its inapplicability.

**B. The materiality of what is sought to the Defence's preparation**

17. At paragraph 30 of the SPO Response, the SPO argues that as charged, it does not matter how the Accused obtained the confidential information. Again, the Defence for Mr. Haradinaj considers this not a matter for the SPO to decide but for the Court. The materiality of the documents to the Defendant and his Defence is maintained.

18. Lastly, the SPO's emotive submissions in paragraphs 35-36 of its Response should briefly be addressed. Then, only in its penultimate paragraph[6] the SPO reveals what may be the real reason for withholding the disclosures about the leaks and drop-offs: disclosing such information would purportedly endanger **[REDACTED]**.

19. To reply simply, the Defence for Mr. Haradinaj invites the Court to disregard these statements as hyperbolic and baseless and instead rule on the submissions, laws and facts before it, in the interests of justice and in the interests of the rights of the Accused to adequately prepare a defence and receive a fair trial.

20. Again, the issue is one of fairness, if a fair trial cannot be guaranteed then there should be no trial at all. The SPO cannot hide behind **[REDACTED]** to justify its failure to adhere to the principles of fairness in the instant case.

## V. CONCLUSION

21. The process by which the documents were leaked and dropped off at the KLA WVA premises *is* relevant and material in order to "***truthfully*** *and* ***completely***

[6] Response, at para. 36.

*establish the facts which are important to rendering a lawful decision*"[7] – which is an obligation under Kosovan law on the prosecution and the Court alike.

22. For the aforementioned reasons, the SPO's arguments should be rejected, the Defence Appeals upheld, and disclosure should be granted.

Word Count: 1649 words

**Toby Cadman**

**Specialist Counsel**

**Carl Buckley**

**Specialist Co-Counsel**

[7] Article 7(1) of the Kosovan Criminal Procedure Code.